

1 **WO**

2  
3  
4  
5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**  
7

8 In re: Application of Credit Suisse Virtuoso  
9 SICAV-SIF in Respect of the Sub-Fund  
10 Credit Suisse (Lux) Supply Chain Finance  
11 Fund  
12

No. MC-21-00051-PHX-DWL

**ORDER**

13 Credit Suisse Virtuoso SICAV-SIF in Respect of the Sub-Fund Credit Suisse (Lux)  
14 Supply Chain Finance Fund (“Petitioner”) filed an *ex parte* application pursuant to 28  
15 U.S.C. § 1782 for leave to serve a subpoena on Katterra Inc. (“Katterra Cayman”). (Doc.  
16 1.) For the following reasons, the application is granted.

17 **BACKGROUND**

18 Petitioner seeks to serve the subpoena (Doc. 1-2) on Katterra Cayman to collect  
19 documents related to a series of transactions involving Katterra Cayman and its affiliates  
20 (collectively, “Katterra”), Petitioner, and others. (Doc. 1 at 1-2.) The subpoena is for “use  
21 in a planned court proceeding in England” and would be potentially used against at least  
22 the following entities: (1) SoftBank Group Corp.; (2) SoftBank Vision Fund LP; (3)  
23 SoftBank Vision Fund II-2 LP; (4) SVF Abode (Cayman) Limited; (5) SVF II Abode  
24 (Cayman) Limited; and (6) SVF Habitat (Cayman) Limited (collectively, the “Potential  
25 SoftBank Defendants”).

26 Credit Suisse (Lux) Supply Chain Finance Fund is sub-fund of Credit Suisse  
27 Virtuoso SICAV-SIF that “was designed to invest primarily in notes connected to so-called  
28 supply chain finance programs, including programs organized by a group of companies

1 collectively known as Greensill.” (*Id.* at 4.) Around the beginning of 2019, the sub-fund  
2 purchased notes backed by the accounts receivable of Katerra. (*Id.*) “With regard to  
3 Katerra specifically, a Greensill company called [Greensill Ltd.] would purchase Katerra’s  
4 accounts receivable pursuant to terms set forth in a Receivables Purchase Agreement  
5 between Katerra and Greensill Ltd. dated December 9, 2019 (the ‘Katerra RPA’).” (*Id.*)  
6 “By early 2020, Petitioner had purchased a total of approximately \$440 million worth of  
7 [n]otes backed by rights to those Katerra receivables.” (*Id.* at 5.)

8 Katerra began experiencing financial difficulties toward the end of 2020. (*Id.*) As  
9 a result of Katerra’s financial instability, Katerra, the Potential Softbank Defendants, and  
10 other entities (not including Petitioner) “engaged in the Katerra Restructuring,” which  
11 included Greensill Ltd. giving up “its right to Katerra’s accounts receivable and [agreeing]  
12 that the Katerra RPA would be cancelled.” (*Id.* at 5-6.) Later, and “most central” to the  
13 current dispute, “Greensill Ltd. and Katerra entered into a letter agreement (the ‘Security  
14 Release Agreement’) wherein Greensill Ltd. purported to release various liens on assets  
15 Katerra had put up as collateral in connection with the Katerra RPA.” (*Id.* at 6.) Then, “on  
16 December 30, 2020, Greensill Ltd. and Katerra entered into a ‘Contribution and Exchange  
17 Agreement’ (the ‘CEA’) by which Greensill Ltd. purported to cancel any amounts then  
18 owed under the Katerra RPA, assigned back to Katerra all rights to any receivables Katerra  
19 had previously sold to Greensill Ltd., and render[ed] the Katerra RPA null and void going  
20 forward.” (*Id.*)

21 Petitioner asserts that it was unaware these transactions were occurring and that the  
22 Potential Softbank Defendants “orchestrated a deal wherein Greensill purported to give up  
23 its rights to the \$440 million outstanding under the Katerra RPA (and associated security  
24 and guarantees) even though it was *Petitioner* who ultimately stood to lose by virtue of that  
25 deal.” (*Id.* at 7.) As a result of the Katerra Restructuring, Katerra Cayman’s equity was  
26 held by some of the Potential Softbank Defendants, Greensill became insolvent, and  
27 “Petitioner has not been paid any portion of the \$440 million it invested into those [n]otes.”  
28 (*Id.*)

1 With this backdrop in mind, the application states that “Petitioner plans to assert a  
 2 claim against the [Potential] Softbank Defendants pursuant Section 423 of the Insolvency  
 3 Act 1986,” which “allows English courts to order remedial measures to make whole  
 4 victims of undervalued transactions that put valuable assets—such as amounts outstanding  
 5 under the Katterra receivables program—beyond the reach of a person or entity, like  
 6 Petitioner, who might make a claim against an insolvent entity for those assets.” (*Id.* at 3.)  
 7 Specifically, Petitioner intends to “allege that the Security Release Agreement, the CEA,  
 8 and the Share Disposal Agreement . . . constituted undervalue transactions within the scope  
 9 of Section 423, and that the [Potential Softbank] Defendants who benefited from those  
 10 transactions ought to make payments or take other action to restore the parties’ positions  
 11 to what they would have been if the transactions had not been entered into and to protect  
 12 the interests of the Petitioner as a victim of those transactions.” (*Id.* at 9.)

13 Although the English Lawsuit had not commenced at the time Petitioner filed the  
 14 application (and the Court is unaware whether it has since commenced), Petitioner explains  
 15 that the “preparation of the English Lawsuit is well advanced” because it “has retained  
 16 U.K. counsel and Petitioner’s U.K. counsel has already: (i) exchanged detailed  
 17 correspondence with counsel for the Softbank Defendants concerning Petitioner’s claim  
 18 under Section 423 and other claims Petitioner may assert and (ii) retained English barristers  
 19 to advise Petitioner and finalize the claim initiating the English Lawsuit.” (*Id.* at 9 [citing  
 20 Doc. 1-3 ¶¶ 61-70, 75].)

## 21 DISCUSSION

22 Petitioner seeks relief on an *ex parte* basis. “[A]n *ex parte* application is an  
 23 acceptable method for seeking discovery pursuant to 28 U.S.C. § 1782.” *In re Application*  
 24 *of Ontario Principals’ Council*, 2014 WL 3845082, \*2 (D. Ariz. 2014). *See also Republic*  
 25 *of Kazakhstan v. Lawler*, 2019 WL 5558997, \*2 (D. Ariz. 2019) (same). “[S]uch *ex parte*  
 26 applications are typically justified by the fact that the parties will be given adequate notice  
 27 of any discovery taken pursuant to the request and will then have the opportunity to move  
 28 to quash the discovery or to participate in it.” *In re Letter of Request from Supreme Court*

1 *of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991). *See also In re Letters Rogatory*  
 2 *from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (“Letters Rogatory  
 3 are customarily received and appropriate action taken with respect thereto *ex parte*. The  
 4 witnesses can and have raised objections and exercised their due process rights by motions  
 5 to quash the subpoenas.”).

6 On the merits, the decision whether to grant a § 1782 application involves a two-  
 7 step inquiry. First, the application must meet the statutory requirements of § 1782. *See,*  
 8 *e.g., Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83-84 (2d Cir. 2004).  
 9 Second, even if the statutory requirements are satisfied, several discretionary factors bear  
 10 on whether relief ought to be granted. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542  
 11 U.S. 241, 264 (2004). “[A] district court is not required to grant a § 1782(a) discovery  
 12 application simply because it has the authority to do so.” *Id.*

### 13 I. Statutory Requirements

14 A district court has the authority to issue a discovery order under § 1782 when three  
 15 criteria are satisfied. The application must show that (1) the person from whom discovery  
 16 is sought “resides or is found” in the same district as the district court; (2) the discovery  
 17 material is for “use in a foreign or international tribunal”; and (3) the application is brought  
 18 by “a foreign or international tribunal or . . . any interested person.” 28 U.S.C. § 1782(a).

19 Here, all three criteria are satisfied. First, Petitioner has submitted evidence  
 20 establishing that Katerra Cayman “resides or is found” in Arizona because, although it is  
 21 incorporated in the Cayman Islands, its principal place of business is in Scottsdale,  
 22 Arizona. (Doc. 1 at 10; Doc. 1-3 ¶ 44.)

23 Second, although Petitioner had not initiated the English lawsuit at the time it filed  
 24 the pending application, “a foreign proceeding need not be ‘pending’ or even ‘imminent’  
 25 when the discovery is sought. So long as a future proceeding is ‘within reasonable  
 26 contemplation,’ it satisfies the statute’s requirement.” *Khrapunov v. Prosyankin*, 931 F.3d  
 27 922, 925 (9th Cir. 2019) (citation omitted). The applicant “must show that the proceeding  
 28 is not speculative, and is ‘more than just a twinkle in counsel’s eye.’” *Leutheusser-*

1 *Schnarrenberger v. Kogan*, 2018 WL 5095133, \*3 (N.D. Cal. 2018) (citation omitted).  
 2 Here, Petitioner has retained counsel, sent a 31-page demand letter to the Potential  
 3 SoftBank Defendants, exchanged follow-up correspondence with counsel for SoftBank  
 4 Group Corp., and developed in extensive detail the legal theories it intends to pursue during  
 5 the contemplated litigation. (Doc. 1 at 7-9; Doc. 1-3 ¶¶ 61-75.) These steps demonstrate  
 6 that the English Lawsuit is within reasonable contemplation and is more than just a twinkle  
 7 in counsel's eye.

8 Third, Petitioner "qualifies as an 'interested person' because it will be a party to the  
 9 anticipated litigation." *In re Eurasian Nat. Res. Corp., Ltd.*, 2018 WL 1557167, \*2 (N.D.  
 10 Cal. 2018).

## 11 II. Discretionary Factors

12 In *Intel*, the Supreme Court identified the following four "factors that bear  
 13 consideration in ruling on a § 1782(a) request":

- 14 (1) Whether "the person from whom discovery is sought is a participant in the  
 15 foreign proceeding," because "nonparticipants in the foreign proceeding may be  
 16 outside the foreign tribunal's jurisdictional reach; hence, their evidence,  
 17 available in the United States, may be unobtainable absent § 1782(a) aid";
- 18 (2) "[T]he nature of the foreign tribunal, the character of the proceedings underway  
 19 abroad, and the receptivity of the foreign government or the court or agency  
 20 abroad to U.S. federal-court judicial assistance";
- 21 (3) Whether the request "conceals an attempt to circumvent foreign proof-gathering  
 22 restrictions or other policies of a foreign country or the United States"; and
- 23 (4) Whether the request is "unduly intrusive or burdensome."

24 542 U.S. at 264-65. Here, all four factors weigh in favor of granting the application.

25 First, Petitioner has submitted evidence that "Katterra Cayman will not be a  
 26 defendant in the English Lawsuit." (Doc. 1-3 ¶ 90.) As such, Katterra Cayman is a  
 27 nonparticipant in the matter for which discovery is sought.

28 Second, the Court is not aware of any authority suggesting that an English court

1 would be unwilling to accept discovery under § 1782. *See, e.g., In re Application of JSC*  
2 *Com. Bank Privatbank*, 2021 WL 4355334, \*1 (N.D. Cal. 2021) (granting § 1782  
3 application for service of a subpoena for evidence to be used in pending litigation in the  
4 United Kingdom). Further, Petitioner has submitted evidence that English courts are  
5 familiar with and receptive to evidence gathered through § 1782 applications. (Doc. 1-3  
6 ¶¶ 91-95.)

7 The third factor is a closer call. Although the application does not appear to be an  
8 attempt to circumvent England’s discovery restrictions, the Court notes that Petitioner is  
9 seeking discovery from Katterra Cayman through this Court rather than in the Cayman  
10 Islands, which is where Katterra Cayman is incorporated. (Doc. 1 at 1.) Nevertheless, there  
11 is no evidence that Petitioner’s request “conceals an attempt to circumvent foreign proof-  
12 gathering restrictions or other policies of a foreign country or the United States.” *Intel*,  
13 542 U.S. at 264-65. For this reason, the third factor weighs in favor of granting the  
14 application or is at worst neutral.


15 Fourth, this request does not appear to be unduly intrusive or burdensome. The  
16 proposed subpoena requests documents from Katterra Cayman from September 2020 to  
17 May 2021 that involve the Katterra Restructuring—specifically, the Security Release  
18 Agreement, the CEA, and the Share Disposal Agreement. (Doc. 1-2.) Rather than request  
19 “any and all” documents, the subpoena seeks tailored documents at the heart of Petitioner’s  
20 underlying insolvency claim with an appropriate temporal restriction. (*Id.*)

21 Accordingly,

22 **IT IS ORDERED** that the *ex parte* application under 28 U.S.C. § 1782 (Doc. 1) is  
23 **granted**.

24 Dated this 27th day of April, 2022.

25  
26  
27  
28



---

Dominic W. Lanza  
United States District Judge